

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

**JAMES CAPORALE, ALFRED PILOTTO, BERNARD
RUBIN, GEORGE WUAGNEUX, SALVATORE TRICARIO,
LOUIS C. OSTRER and JOHN GIARDIELLO,**

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

**PETITIONERS' REPLY TO GOVERNMENT'S
RESPONSE TO PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

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**GOVERNMENT IGNORES THE CONSTITUTIONAL
RIGHT TO A FAIR AND IMPARTIAL JURY**

The Government concedes the record is replete with juror comments linking both the Italian defendants and an Italian juror to the Mafia or "underworld." The Government attempts to dismiss or minimizes the significance of those ethnic slurs, arguing such remarks were made in "jest," and that the issue presented herein is an "intra-circuit conflict" not appropriate for resolution by this Court (Gov. Brief, at pp. 7-10). Both arguments seriously distort the record and the importance of the Constitutional

right to a fair and impartial trial by jury guaranteed by the Sixth Amendment.

The Government's argument that the issue presented here is simply an "intracircuit conflict" between the decision below and that in *United States v. Heller*, 785 F.2d 1524 (11th Cir. 1986), deliberately obscures the importance of the actual issue involved which is the fundamental Constitutional right of all defendants to trial by a fair, impartial jury, untainted by the pernicious effects of ethnic stereotypes and bias so blatantly displayed by the jurors in this case. The Court of Appeals' decision in this case conflicts not merely with *Heller, supra*, but with decisions of this and every other court which has considered the effect of juror bias upon our criminal justice system. See, e.g., *Irvin v. Dowd*, 355 U.S. 717, 721-22 (1961); *People v. Leonti*, 262 N.Y. 256, 186 N.E. 693 (1933); *Gilford v. State*, 49 Tex. Cr. R. 275, 92 S.W. 424 (1906) and cases cited in Petition for Writ of Certiorari at pp. 10-15. Certainly, a decision affirming a jury verdict against Italian defendants, in a RICO case, despite evidence of numerous statements by jurors linking Italians generally and the defendants in particular to the Mafia, is an affront to principles fundamental to our system of justice and cannot fairly be characterized as presenting only a narrow issue of an "intracircuit conflict." The larger Sixth Amendment issue cannot be overlooked without comment.

The case at bar is unique as a reviewing court rarely is afforded the opportunity to view juror expressions of bias which while not recognized as part of their direct thought processes on guilt or innocence influenced and shaped their verdict. To this extent this is a case of first impression.

Both the trial and appellate courts, and even the Government, concede that the taunts, slurs and remarks were improper juror conduct. But the statements are more than inappropriate jokes. They strike at the right to an impartial jury who will decide the case on the evidence rather than ancestry.

The statement "That one looks like a criminal" is an obvious predisposition toward guilt, followed directly by "They must all be Mafia." These statements are not taken out of context, but are juror remarks which when coupled with comments, "I'm Italian, I shoot people for a living," and "You must be one of them," are clear indicia that an anti-Italian chill permeated the jury room, which affected Juror Curtice who stated that he felt a resentment by other jurors because he was Italian.

Nor can the decision below be justified, as argued by the Government, by observing that the ethnic slurs were made in a "joking" manner. Bigotry, while not uncommon in our society, is not generally favored and is often masked by what passes for "humor" as noted so eloquently in *Heller, supra*, at 1527. While it would be most unusual for a juror to admit openly that he harbors ethnic bias which precludes him from rendering a fair verdict,¹ the "jokes" made by the jurors in this case constitute an unmistakable manifestation of ethnic bias directly related to defendants' guilt. If such naked expressions of prejudicial bias as "That one looks like a criminal" and "Well, they must all be Mafia" (Tr. 9/7/84 pp. 87-89) can be rendered "harmless" by the mask of "humor," the fun-

¹ See, *McDonough Power Equipment v. Greenwood*, 464 U.S. 548, 558 (1983).

damental guarantee of a fair trial by unbiased jurors will be reduced to little more than a hollow slogan. Bias such as that expressed by jurors in this case, which relates directly to a presumption of guilt, cannot be effectively insulated from scrutiny by the form or manner in which it is expressed. When bias or prejudice is revealed in so clear a fashion as at bar, this Court must take corrective action to remedy the obvious injustice to defendants who may have been convicted not on the basis of the evidence, but because they were Italian² and "looked like" Mafia, and, equally as important, the Court must act to avoid even the appearance of permitting ethnic bias to infect our criminal justice system.

CONCLUSION

The Government's attempt to obfuscate and trivialize the importance of this case should not be rewarded. Rather, this Court must grant the Petition and reverse the decision below because defendants were denied their Constitutional right to a fair trial by an impartial jury guaranteed by the Sixth Amendment.

² That other Italian defendants were acquitted does not mean, as argued cynically by the Government, that bias played no role in the verdict. It is cold comfort, indeed, to defendants that the jury's bias may not have prejudiced all defendants equally, especially given evidence of statements by at least one juror that some defendants would have to be "sacrificed." (Tr. 9/7/84, p. 104). Nor can the decision below be justified, as claimed by the Government, on the basis that the prejudicial "jokes" were made during lunch or coffee breaks. To the contrary, the record demonstrates that the ethnic slurs were made only after the case was submitted to the jury for deliberation. (Tr. 9/27/84, p. 1505).

For these reasons, Petitioner respectfully requests that a Writ of Certiorari issue to review the judgment of the Court of Appeals.

Respectfully submitted,

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